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THE LIEN OF WAREHOUSEMEN AND WHARFINGERS—ITS NATURE AND EXTENT.

LIENS arising out of bailments are of two kinds, the common-law lien and the commercial lien. The former is specific only, as in the case of common carriers and innkeepers, who are bound to receive and transport or entertain, for customary charges; and in the case of artisans, who by their skill and labor impart an additional value to the thing bailed. This common-law right of specific lien is said to rest on principles of natural equity and commercial necessity; it prevents circuity of action and gives security and confidence to agents.

The commercial or general lien, the right to retain for a general balance of account, exists in favor of factors and some others; it depends for its sanction upon the usages of merchants, is viewed as an encroachment on the common law, and is said not to be favored.

Warehousemen and wharfingers are not bound to receive the goods of another, nor yet can they be said by their labor and skill to impart an additional value to the thing bailed. Hence it would seem that, under the construction given the terms labor and skill in this connection, this class of hirers of custody derive no right of lien from the common law.

There is a singular confusion, among our most eminent text-writers, on the subject under consideration. Prof. Parsons, Parsons on Contracts, III. 268, says: "A wharfinger's lien is both

particular and general. His rights are regarded as co-extensive with those of the factor." Warehousemen are treated in the same connection, and are not distinguished from wharfingers.

Judge STORY, *Story on Bailments*, §§ 452-3, says: "The case of a wharfinger does not indeed seem in any respect distinguishable from that of a warehouseman, and it has not in fact been distinguished from it in any solemn adjudication. * * * * * Whether the class of persons we are considering, that is, hirers of custody, have a lien on the thing for their hire, labor and services, is a matter upon which the authorities do not seem agreed, or at least do not present rules to guide us. Upon general principles it would seem that they ought to have a specific lien on the thing, for such hire, labor and services, like artisans. The question whether they have a general lien for a balance of account is quite a different question, and depends upon different principles. It has recently been held that warehousemen have a specific lien, although they certainly cannot be said by their care and skill to have improved the thing bailed. The same would seem to belong to a wharfinger."

Angell on Carriers, § 66, is to the same effect as the foregoing extracts from *Story on Bailments*.

Chancellor KENT, *Kent's Com.*, III., §§ 635-641, says: "This right of a particular or specific lien applies to warehousemen and wharfingers. * * * * * It was also decided by Lord KENYON, and afterwards recognised as settled law, that a wharfinger had not only a lien on goods deposited at his wharf, for the money due for wharfage of those particular goods, but that he was also entitled by the general usage of his trade to retain them for the general balance of his account due from the owner."

In fine, while in *Story on Bailments* and in *Angell on Carriers* the particular lien in favor of the class we are now considering is not considered sufficiently settled, yet in *Kent's Commentaries* and in *Parsons on Contracts* the wharfinger's right of general lien is expressly stated, and nowhere, by any of the learned authors, is there any allusion to a supposed distinction between warehousemen and wharfingers, save in *Story on Bailments*, and then only to be refuted.

In the case of *Rex v. Humphrey*, 1 McClel. & Y. 194, the court, referring to the two cases in *Espinasse's Reports*, *post*, say: "The wharfinger's lien for a general balance of account is

equally clear and decided as in the case of a factor." "After these cases," says GRAHAM, B., "it seems to me to be infinitely too much to be argued in a court of law that this right of wharfingers is not perfectly clear and universally admitted. * * * In my experience I have always considered the case of a wharfinger and of a warehouseman as standing on the same ground." But doubt being intimated by other of the judges on the last point, the case was reserved, and afterwards that question was held immaterial to the same.

The first of the cases in Espinasse's Reports was *Naylor v. Mongler*, 1 Esp. 109. The case was tried before Lord KENYON, at *nisi prius*, in 1794. The plaintiff had purchased from one Boyne twenty-five hogsheads of sugar, then lying in defendant's warehouse, who was a wharfinger. Boyne was in debt to the defendant, part of which only was on account of the sugars; the remainder was for the balance of a general account, for which the defendant claimed a lien, and refused to deliver until the same was paid. The usage was established by witness, and Lord KENYON said, "That a lien from usage was a matter of evidence; the usage in the present case has been proved so often, it should be considered a settled point."

Spears v. Hartley, 3 Esp. 81, was tried before Lord ELDON, also at *nisi prius*. The case was identical with *Naylor v. Mongler*. Lord ELDON said: "This point has been ruled by Lord KENYON, and considered as a point completely at rest. I shall therefore hold it as the settled law on the subject, that he has such a lien as claimed in the present case."

The American cases are few, and afford but little satisfaction. There is probably but a single case directly upon the point. In *Scott v. Jester*, 8 Eng. (13 Ark. 446), it was held that warehousemen had only a particular lien; the court further say: "Warehousemen certainly have not a general lien, authorizing a detention of goods not only for demands accruing out of the article retained, but for a balance of accounts relating to dealings of a like nature." But the fact that in the decision of that cause no reference was made to the cases in Espinasse's Reports and the one in McClel. & Y., *ante*, will probably detract from its weight, and leave its authority to depend largely upon the reasoning by which it may be maintained.

In *Steinman v. Wilkins*, 7 W. & S. 466, it was held that ware-

housemen were entitled to a specific lien ; that they may deliver a part and retain the residue, for the price chargeable on all the goods received at the same time and under the same bailment. Though the question was not presented by the case, the court incidentally assents to the doctrine of a general lien in favor of wharfingers, but adds "that no text-writer has treated of warehouse-room as a subject of lien in any shape, and there is no evidence of a foundation for it." The specific lien in favor of the warehouseman is, however, maintained in this case as a common-law lien, not dependent on commercial usage. Said GIBSON, C. J., in the case last cited: "We here see (referring to *Jackson v. Cummins*, 5 Mees. & Wels. 342) the expiring embers of the primitive notion that the basis of this lien is intrinsic improvement of the thing by mechanical means. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and conveniences of the world."

Whether it would not have been more logical, in the first instance, to have rested this lien on the ground assigned it by the learned Chief Justice in the case last cited, may well admit of doubt. And whether commercial convenience would not have been better subserved by giving a general lien in favor of wharfingers and warehousemen only for the balance due them on account of wharfage or warehouse charges, instead of extending the lien to all balances whatsoever, it is now too late to inquire.

The wharfinger's lien is now firmly fixed, both in this country and in England ; it is fixed upon the basis of a commercial usage that has become law, and it unquestionably extends to all balance of account whatsoever that may be due by the owner.

It would indeed tend to inextricable confusion to allow the wharfinger's lien as commercial, and deriving its sanction from usage only, and at the same time to maintain that of the warehouseman as a common-law right.

In respect to this right of lien, there can be no possible distinction in reason between the wharfinger and the warehouseman, nor is there any to be found in authority. While it is true that in the first of the cases in *Espinasse's Reports*, "defendant was a wharfinger having the goods stored in his warehouse," and in the other is also spoken of as a wharfinger, yet it is apparent from the text of the cases that no such distinction was deemed to exist.

It is to the mere intimation of a doubt by a plurality of the Barons in *Rex v. Humphrey*, that we owe the vague impression of a possible difference between the lien of warehousemen and wharfingers. Ordinarily the wharfinger's charges accrue for the mere passing over his wharves of freight, in the loading and unloading of cargo; he expends no labor or skill upon the goods, and has but the slightest tenure of possession; whereas, in the storing of goods, the warehouseman has a continuous and well-defined possession, and bestows labor and skill upon them. However, we take it, upon principle and authority, there is no substantial difference.

While the cases in Espinasse's Reports were determined at *nisi prius*, yet the eminence of the jurists who presided, of the counsel employed, with the universal acquiescence signified by the lapse of three-quarters of a century without their being disturbed, together with the confirmation they received in the Exchequer of Pleas from *Rex v. Humphrey*, have impressed upon them the stamp of very respectable authority.

ROBT. G. STREET.

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RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

JOHN STANTON AND WIFE v. HAVERHILL BRIDGE CO.

The question of the competency of a foreign corporation to be sued is admitted by a general appearance from term to term and filing no dilatory plea.

A bridge corporation, which demands and receives tolls of travellers, is bound to keep its bridge and approaches in safe condition for use, and cannot excuse itself by impeaching its own title to maintain the same.

THIS was an action on the case by a toll-paying traveller to recover damages for a personal injury to the wife, accruing from the insufficient condition of defendant's bridge across Connecticut river. The other facts appear in the opinion, which was delivered by

REDFIELD, J.—I. However defective was the service of this process, we think the appearance of the defendant, by counsel, at the first term, and suffering a general continuance for that and the succeeding term of the court, is a waiver of all dilatory pleas, and